

**OPEN RECORDS AND MEETINGS OPINION
2010-O-01**

DATE ISSUED: February 5, 2010

ISSUED TO: Ward County Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jim Lee asking whether the Ward County Commission violated N.D.C.C. § 44-04-20 by holding meetings without prior notice.¹

FACTS PRESENTED

The Ward County Commission (Commission) is made up of five members: Bruce I. Christianson, Carroll Erickson, Jack Nybakken, John Fjeldahl, and Jerome Gruenberg. At the June 16, 2009, regular meeting the Ward County Sheriff raised several concerns about courthouse security. As a result of the concerns, the Commission created a security committee to review the courthouse security policy and procedures.² The members of the security committee consisted of seven members, one of whom is a member of the county commission.³ The security committee was to return to the Commission with security recommendations.

The security committee met three times: June 29, November 19, and November 25, 2009.⁴ No public notice was given for the meetings held at the Ward County Courthouse and no minutes were prepared, although notes were taken by Devra Smestad.

¹ The requester also asked if the County Commission circumvented the county's Home Rule Charter when it approved the courthouse security policy without a first or second reading of the policy as required by the charter. That issue is not within the scope of the open meetings law and will not be further addressed.

² Minutes of Ward County Commission meeting (June 16, 2009).

³ Id.

⁴ Letter from Bruce I. Christianson, Chairman, Ward County Commission, to Mary Kae Kelsch, Assistant Attorney General (Dec. 22, 2009).

The requester, Mr. Lee, asked the auditor to tell him when the security committee was meeting so he could attend the meetings. The auditor did attempt to call Mr. Lee prior to the first meeting but was unable to contact him. Later, the auditor was told that Mr. Lee could not attend the meetings because they were “closed meetings” so the auditor did not tell Mr. Lee about the remaining meetings.

ISSUE

Whether the Commission violated N.D.C.C. § 44-04-19 and 44-04-20 when its security committee held three meetings that were not open to the public or publicly noticed.

ANALYSIS

The Commission is the governing body of Ward County and a public entity.⁵ All meetings of a public entity must be open to the public unless otherwise specifically provided by law.⁶ Any committee created by a governing body must also comply with the open meetings law by holding public meetings and providing public notice as provided in N.D.C.C. § 44-04-20.⁷ Membership on a committee subject to the open meetings law is not limited to county commissioners because a “governing body” includes “any group of persons, regardless of membership” that is “acting collectively pursuant to authority delegated to that group by the governing body.”⁸ Thus, even though only one county commissioner served on the committee, the security committee was still subject to the open meetings law because it was created by the Commission.⁹

If an executive session is held by a governing body, notice must still be provided pursuant to N.D.C.C. § 44-04-20 which provided that public notice must be given in advance of all meetings of a public entity, including executive sessions, conference call meetings, and videoconferences.¹⁰

⁵ N.D.C.C. § 44-04-17.1(12)(b).

⁶ N.D.C.C. § 44-04-19.

⁷ See N.D.A.G. 2009-O-12; N.D.A.G. 2003-O-13; N.D.C.C. § 44-04-20(1) (public notice must be given in advance of all meetings of a public entity); N.D.C.C. § 44-04-17.1(12)(b) (public entity includes governmental commissions of any political subdivision); and N.D.C.C. § 44-04-17.1(6) (“governing body” includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body).

⁸ N.D.C.C. § 44-04-17.1(6) (definition of governing body).

⁹ See N.D.A.G. 2007-O-15; N.D.A.G. 2007-O-13; N.D.A.G. 2006-O-03; N.D.A.G. 2004-O-15; N.D.A.G. 2003-O-13.

¹⁰ N.D.C.C. § 44-04-20 (emphasis added).

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Here, the security committee met three times, but never provided notice of its meetings.¹¹ According to the Commission, no notice was provided because it considered the meetings to be “closed”¹² based on the security committee’s purpose of discussing courthouse security.¹³ The Commission points to three statutes related to the exemption of security system plans.¹⁴ Because the definition of “security system plan” does include plans relating directly to the physical or electronic security of a public facility, it is conceivable that some or all of the security committee’s discussions could have been closed to the public under these statutes.¹⁵

However, the Commission overlooks the fact that the statutory authority to close the meeting to discuss security system plans can only be invoked during an open meeting according to N.D.C.C. § 44-04-19.2(1).¹⁶ Before a governing body can close a meeting to discuss exempt information it must first convene in an open session and, unless a meeting to discuss confidential information is required, pass a motion to hold an executive session.¹⁷ A motion is necessary with regard to exempt information because a governing body has the discretion to disclose exempt records.¹⁸

The security committee was also required under N.D.C.C. § 44-04-19.2 to follow other procedural requirements, such as announcing the topics and legal authority for the

¹¹ Letter from Bruce I. Christianson to Mary Kae Kelsch, Assistant Attorney General (Dec. 22, 2009).

¹² See N.D.C.C. § 44-04-17.1(1) (“closed meeting” means all or part of an exempt meeting that a public entity in its discretion has not opened to the public...”).

¹³ Letter from Bruce I. Christianson to Mary Kae Kelsch, Assistant Attorney General (Dec. 22, 2009).

¹⁴ N.D.C.C. § 44-04-24 (exemption of security system plan); N.D.C.C. § 44-04-25 (exemption of public health and security plans); N.D.C.C. § 44-04-26 (exemption from public meeting requirements of security system plans).

¹⁵ Mr. Lee has not asked this office whether the subject matter of the meetings were “security system plans” as defined in N.D.C.C. § 44-04-24 and thus properly closed under N.D.C.C. § 44-04-26.

¹⁶ N.D.C.C. § 44-04-19.2 requires multiple procedural steps that must be taken when a governing body holds an executive session.

¹⁷ N.D.C.C. § 44-04-19.2(2)(a). No motion is required to discuss confidential information because a governing body does not have the discretion to disclose confidential records. See N.D.C.C. § 44-04-17.1(3) (definition of confidential meeting or confidential record). However, the other procedural requirements in N.D.C.C. § 44-04-19.2, such as announcing the legal authority for the executive session, are still applicable.

¹⁸ See N.D.C.C. § 44-04-17.1(1),(2) (definitions of closed meetings and closed records). For example, the security committee chose to discuss the exempt security system information in an open meeting when presenting its report to the full Commission. See Minutes of Ward County Commission meeting (December 1, 2009).

executive session, recording the executive session, and taking final action in the open portion of the meeting.¹⁹ Therefore, even though the security committee had discretion over the release of the subject matter, it did not have the option to ignore the notice and procedural requirements of the open meetings law.

It is my opinion that because the security committee failed to notice the meetings pursuant to N.D.C.C. § 44-04-20 or follow the procedural requirements to hold a closed meeting pursuant to N.D.C.C. § 44-04-19.2, the three meetings of the security committee violated N.D.C.C. § 44-04-19 and N.D.C.C. § 44-04-20.

The Commission also argues that N.D.C.C. § 11-11-14(2), which authorizes county commissioners “to make all orders respecting property of the county,” implies that orders may be made without prior notice and any input from the public. The statute provides no such implication.

The language in N.D.C.C. § 11-11-14 sets forth a county commission’s powers. The open meetings law does not diminish those powers, but instead, sets out procedural requirements that must be followed while carrying out the powers. The Commission is authorized to make orders respecting property of the county, but it is legally obligated to make such orders in a public meeting that is legally noticed to the public. Even if the public is not authorized to attend an executive session of a meeting or give input on a meeting topic,²⁰ the public still has a right to know the subject on which the governing body is meeting. It is my opinion that N.D.C.C. § 11-11-14 is not an exception to the open meetings law.

CONCLUSIONS

The meetings of the Commission’s security committee were subject to the open meetings law and should have been noticed, consistent with N.D.C.C. § 44-04-20, prior to the meetings.

STEPS NEEDED TO REMEDY VIOLATION

A notice of the three special meetings of the County Commission's security committee that contains the date, time, and location of the meetings, as well as the topics discussed during the meetings, must be prepared and filed with the county auditor and posted at the county courthouse. The notice must also be provided to the county’s official newspaper and any person who had previously requested notice. Finally, minutes of the open portions of the security committee meetings, consistent with the

¹⁹ N.D.C.C. § 44-04-19.2(2)(b),(c), & (e).

²⁰ See N.D.A.G. 2007-O-11; N.D.A.G. 2003-O-07 (the right to access a public meeting is not the right to participate).

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requirements of N.D.C.C. § 44-04-21(2), must be created and provided to Mr. Lee at no cost.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.²¹ It may also result in personal liability for the person or persons responsible for the noncompliance.²²

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mjm/vkk

²¹ N.D.C.C. §44-04-21.1(2).

²² Id.